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Supreme Court of the United States

October Term, 1956

No. 283

SAMUEL FURMAN,

Plaintiff,

—v.—

THE UNITED STATES,

Defendant.

PETITION FOR WRIT OF CERTIORARI

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To the Honorable Supreme Court of the United States:

The petitioner, Samuel Furman, respectfully presents his petition for a writ of certiorari to the United States Court of Claims.

Opinion

The opinion of the Court below, appended hereto, is cited in 140 F. Supp. 781.

Jurisdiction

Jurisdiction of this Court is invoked under the Act of Congress of June 25th, 1948, Ch. 646, Sec. 1, 62 Stat. 928, 28 U. S. C. Sec. 1255, which provides for the review of judgment of the Court of Claims upon petition for a writ of certiorari.

Judgment of the United States Court of Claims dismissing the petition herein was entered on May 1, 1956.

Question Presented for Review

Is a purchaser of Government surplus property barred from recovery for shortage in quantity delivered by the Government by a provision in the terms of sale that the Government does not guaranty the quantity, where in fact the Government does specify and represent the quantity?

Statement of the Case

Plaintiff is a purchaser from the Government of surplus textile goods. The invitation to bid described the goods and stated the yardage thereof as follows:

Item No.	Description and Location of Property	Quantity	Unit of Measure, Gross Wt.
1	Cloth, Wool, Bunting, Scarlet, 62" (Approx. 94,318 yds.) Acquisition Cost, $174,488.30	40,000	lbs.
2	Cloth, Wool, Bunting, Blue 56".. (Approx. 7,957 yds.) Acquisition Cost, $13,526.90	4,000	lbs.

Bids for the goods were to be made per pound and payment was to be made according to the number of pounds delivered. The terms of sale provided that the bidder should accept and pay for any number of units delivered by the Government up to 25% more or less than the estimated quantities stated in the bid schedule.

Prior to the bid, the Government advised the plaintiff that the goods were made up in 1,183 rolls of Item 1 and 58 rolls in Item 2 or a total of 1,241 rolls *and that the yardages were as indicated in the bid schedule* (Pltff's affidavit, p. 5). Plaintiff was shown one roll of each item which he inspected for quality, thickness and condition.

The custom and trade practice in the purchase of textiles is that the same are bought and sold by the yard. The designation of the weight in the instant case was for the convenience of the Government. This was recognized by the Government as stated in its brief in the Court of Claims as follows (p. 8):

> "Cloth goods are generally sold by the yard and bring a better price when sold on that basis rather than by the pound. The goods were sold by the pound in this case to save the Government the expense of measuring or examining them."

The majority in the Court of Claims recognized and stated in its opinion that textiles are usually bought and sold on a yardage basis (Opinion, p. 4).

The representation of yardage per pound is important since in accordance with trade practice, price is based upon the yardage. The weight of the goods was merely a convenient method supplied by the Government to prospective bidders for the purpose of determining the yardage according to the ratio of total yards to the number of pounds or the number of yards in each pound.

The only means which plaintiff therefore had of knowing the quantity of yards upon which to bid was by reliance on and acceptance of the Government statement in the bid

schedule as to the yardage and the ratio of yards to the pound as shown in the invitation to bid.

The invitation to bid based upon the total quantity of yards and the weight stated disclosed a ratio of 2.358 yards per pound in Item 1 and 1.989 yards per pound in Item 2.

The Government obviously committed a gross error in fixing the weight of the goods since after the delivery of the goods, as hereafter shown, the correct weight was given and plaintiff was charged therefor. The error is further substantiated by the fact that after the delivery of the goods and demand by the Government for increased payment, plaintiff visited the Philadelphia Quartermaster Depot and complained about the shortages and the Government's method of adjustment based on a variation in weight only without taking into consideration an adjustment based on yardage. Plaintiff was shown the Government books and shipping records which indicated the yardage in each roll and the total yardage in each item. The yardages were correctly stated in each item. However, in fixing the weight of the goods, the error in the weight was transcribed from the shipping records to the invitation to bid and thus misled the plaintiff in the ratio of yards per pound.

Prior to the bid, the Government reduced the quantity offered in Item 1 from 40,000 pounds to 39,000 pounds, and in making such reduction followed the above ratio of 2.358 yards per pound, and indicated the reduction in yardage from 94,318 yards to 91,960 yards.

Plaintiff submitted a bid of .682 per pound for the goods in each item, or a total bid of $26,598 for Item 1 and $2,728 for Item 2. This was at the rate of $.294 per yard in Item 1 and $.342 per yard for Item 2.

Upon delivery of the goods by the Government, it was found that Item 1 weighed 48,685 pounds instead of 39,000 pounds as indicated in the bid schedule and as reduced by the Government and that Item 2 weighed 4,938 pounds instead of 4,000 pounds as indicated in the bid schedule. Pursuant to the terms of sale, plaintiff paid to the Government the additional sum of $7,244.89.

Based on the ratio of 2.358 yards per pound in Item 1, plaintiff should have received 114,799 yards. Instead, he received only 83,147 yards, a difference of 31,651 yards, or 28%. At the rate of $.294 per yard bid and paid by plaintiff according to the above ratio of 2.358 yards per pound, plaintiff overpaid the Government on Item 1 the sum of $9,305.39.

Based on the ratio of 1.989 yards per pound in Item 2, plaintiff should have received 9,821 yards. Instead, he received only 7,957 yards, a difference of 1,864 yards, or almost 18%. At the rate of $.342 per yard bid and paid by plaintiff according to the above ratio of 1.989 yards per pound, plaintiff overpaid the Government on Item 2 the sum of $639.72.

It will be noted that notwithstanding such substantial shortages, the majority opinion in the Court of Claims refers to the yardage delivered as only "slightly less than what had been estimated" (Opinion, p. 2). In the dissenting opinion, however, the shortages were described as "ruinous" (Opinion, p. 5).

This action was instituted to recover the overpayments totalling $9,945.11.

The Government moved, in the Court of Claims for summary judgment dismissing the petition on the ground that there is no issue as to any material fact and that defendant is entitled to judgment as a matter of law. The basis of the motion and the decision of the Court of Claims was the exculpatory provision in the terms of sale whereby the Government did not guaranty the quantity or quality of the goods.

Judge Madden in his dissent in the Court below, commented on the motion as follows:

> "In spite of all the exculpatory clauses naturally included in a contract for a sale of surplus property, I think there are still some standards of fair dealing which are applicable" (Opinion, p. 4).

The majority in the Court of Claims applied and emphasized the contract provision that no claim would be considered for allowance based upon failure of the property to correspond with the standard expected (Opinion, p. 3), and dismissed the petition.

The petition, however, is not based upon a claim of nonconformance of the goods to standard but upon shortage in the quantity delivered.

Since the judgment herein is based upon the denial of liability on the part of the Government under the terms of sale, the facts as to the misrepresentation of the quantities to be delivered by the Government and the failure to deliver the quantities specified must be accepted as claimed by the plaintiff.

This case presents a question of importance and wide public interest as to the construction of Government con-

tracts for the sale of surplus property. As Judge Madden stated in his dissent (p. 5):

> "These victories for the Government are Pyrrhic victories indeed. If it wins enough of them it will not be able to sell its surplus cloth at all."

Jurisdiction in the Court of Claims

Jurisdiction of the Court of Claims was invoked under the Act of Congress, June 25, 1948, c. 646, Sec. 1, 62 Stat. 940, 28 U. S. C. 1491, which provides as follows:

> 1491. Claims against United States generally—The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Amplification of Reasons Relied on for Allowance of Writ

Errors in the Decision of the Court of Claims

The majority in the Court below apparently misconstrued the nature of plaintiff's claim. It is stated in the majority opinion that plaintiff alleges that the goods weighed more per yard than had been estimated and that he is entitled to recover the amount he was required to pay on account of the excess weight (Opinion, p. 2).

The petition, however, is based upon a claim arising from shortage in yardage delivered, not for a refund of the sum paid by plaintiff for excess weight. If this were a claim based on an excess weight, the amount sought to be recovered would have been the additional amount paid by plaintiff by reason of the excess weight, or the sum of $7,244.89. The petition, however, alleges a claim for $9,945.11, which was the overpayment based on shortage in yardage according to the ratio of yards per pound fixed by the Government (Petition, par. 5, 13-21).

There is no dispute or claim relative to the weight of the goods. Therefore, the emphasis in the majority opinion upon the contract provision that the sale was on a gross weight basis is misplaced (Opinion, pp. 3, 4).

The overpayment by plaintiff resulted from the failure of the Government to deliver the correct number of yards of goods according to the gross weight as represented by the Government.

Clearly, the Government misinformed the plaintiff as to the yardage. With respect thereto, Judge Madden, in his dissent, said (Opinion, p. 5).

> "In spite of all the exculpatory clauses naturally included in a contract for a sale of surplus property, I think there are still some standards of fair dealing which are applicable. The Government, for convenience, was selling cloth by the pound, a unit of measure of no relevance to persons who intend to use cloth. The plaintiff inquired how many yards there were and the Government told him, by looking at the invoices on which it had bought the cloth by the yard. On the invitation for bids, the Government

said that there were 40,000 pounds in the lot. A prudent bidder would then, since he would have to resell or use the cloth by the yard, compute the number of yards in a pound and set his bid price per pound accordingly. The plaintiff did this. There was no reason to suppose that a mistake so great as that made by the Government in weighing, or in recording the weight figures, would occur. We have no idea how it happened to occur. But it was ruinous to the plaintiff, because the additional thousands of pounds which he had to pay for gave him no additional yards which he could sell or make into garments."

The question presented by this case is whether under the foregoing circumstances showing that the Government clearly misled the plaintiff and caused him substantial damage, the Government may be relieved from its responsibility therefor by a contractual "as is" provision.

Plaintiff May Recover for Shortage in Yardage Delivered Based on the Misrepresentation of Number of Yards per Pound, Notwithstanding the Provision in the Terms of Sale That the Government Does Not Guaranty the Quantity in Pounds

The provision in the terms of sale in the case at bar with respect to Government guaranties is as follows:

> "CONDITION OF PROPERTY.—All property listed is offered for sale 'as is' and 'where is' and without recourse against the Government. If it is provided herein that the Government shall load, then 'where

> is' means f.o.b. conveyance at the point specified in the Invitation. The description is based on the best available information, but the Government makes no guaranty, warranty, or representation, expressed or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose *and no claim will be considered for allowance or adjustment or for rescission of the sale based upon failure of the property to correspond with the standard expected; this is not a sale by sample.*" (Italics supplied.)

The foregoing provision was the basis of the majority decision in the Court of Claims. However, such provision does not excuse the Government for misrepresentation as to the number of yards per pound. This is a fact which the Government knew or should have known. Although it was provided that no claim would be considered based on the failure of the goods to conform to standard, there is no provision that no claim would be considered based on shortages in quantity delivered.

Although the Government did not guarantee the quantity in pounds, it did definitely represent the yardage per pound. If the yardage had no bearing upon the bid, there would have been no reason for mentioning the yardage in the invitation.

In *W. Shanhouse Sons, Inc.* v. *U. S.*, 61 C. Cls 840, an action was brought on a claim for shortage in yardage of certain surplus material. The Court, construing the effect of a provision in the offer that a discrepancy in actual

quantities would not invalidate the sale or be a basis for a claim, stated (p. 845):

> "The plaintiff submitted its bid for certain surplus property offered by the Government, the terms of the offer appearing in the findings. Among these was a provision that a discrepancy in the actual quantities of articles sold and available for delivery would not invalidate a sale or be a basis for a claim, but it was provided: 'The purchaser will be required to pay, on the basis of the purchase price, for what he actually receives.' Manifestly, this quotation is not intended to be opposed to the preceding statement relative to the invalidation of the sale or basis for a claim. What is meant is that a shortage in the quantity could not be made a basis for a claim for damages as upon a breach of a contract, and this is consistent with the provision that the purchaser would be required to pay for what he got. In this case the plaintiff paid for over 57,000 yards of the cloth mentioned in the catalogue. When delivery of the cloth was made shortages were discovered and the plaintiff made complaint of this condition. The cloth was then measured in the presence of the officers of the Government having the matter in charge, and the expense of this measurement was borne by the plaintiff. It developed that there was an aggregate shortage of 1,087¾ yards. The plaintiff's claim for refund of the amount at the purchase price was recommended for payment. The Assistant Attorney General, when the case was submitted, stated to the court that he saw no defense to the claim. We concur in this view. Judgment should be rendered in favor of the plaintiff for that amount claimed, being the overpayment at the prices

> stated in its bid, which amount should be refunded to it."

In *S. Brody* v. *U. S.*, 64 C. Cls 538, the Court held that where supplies are sold by the Government "as is", a purchaser who had bid upon the quantity specified and had made payment therefor, was entitled to recover for shortage in delivery.

The Court stated as follows (p. 543):

> "Clearly, under the proposal and the decision cited, there can be no recovery except as to the shortage in the number of bags delivered to plaintiff. The sale was 'as is', an opportunity was given for inspection and notice was given that no allowance would be made on account of materials not being as represented. * * * It appears from the findings that the number of bags delivered to plaintiff was 5,522 less than the number he purchased, and he should be allowed the purchase price of $0.093 for each bag or $513.55. It is so ordered. See Shanhouse Sons, Inc. v. United States, 61 C. Cls 840."

So in *Triad Corporation* v. *United States*, 63 C. Cls 151, where plaintiff attempted to recover for defects in the goods purchased, the Court under an "as is" provision denied recovery, but pointed out that the claim was not for shortage in quantity, as to which the Court held in effect, that recovery would be allowed.

Exculpatory provisions designed to relieve a party from liability with respect to representations have uniformly been held to have no binding effect, where such party misrepresents a material fact.

In *Young-Fehlhaber Pile Co.* v. *State of New York,* 30 N. Y. Supp. 2d 192, 177 Misc. 204, aff'd 37 N. Y. Supp. 2d 928, 265 App. Div. 61, where a contract provided that a contractor would make no claim by reason of estimates or representations, and where the State misrepresented water elevations on a contour map, the Court refused to enforce the contract provision, and said (p. 195):

> "It has been said with great force and sound philosophy that: 'The state is called upon, in contracting with its citizens to set a standard which for fairness, justice, equity, honesty and plain, frank statement of its purpose, without subterfuge or circumlocution, shall be beyond all criticism as being in anyway possible of deception.' Atlanta Construction Co. v. State, 103 Misc. 233, 175 N. Y. S. 453, 454.
>
> "It is a well established doctrine that a party to a contract cannot by a misrepresentation of a material fact induce the other party to enter into it to his damage, and then protect himself from the legal effect of such misrepresentation by inserting in the contract a clause to the effect that: 'He is not to be held liable for the misrepresentation which induced the other party to enter into the contract. The effect of misrepresentation and fraud cannot be thus easily avoided. If it could be, the implied covenant of good faith and fair dealing existing in every contract would cease to exist.' Brassil v. Maryland Casualty Co., 210 N. Y. 235, 104 N. E. 622, L. R. A. 1915A, 629, cited with approval in Jackson v. State, 210 App. Div. 115, 205 N. Y. S. 658, 661, affirmed, 241 N. Y. 563, 150 N. E. 566."

In *Arthur A. Johnson Corp.* v. *City of New York,* 162 Misc. 665, 295 N. Y. Supp. 547, aff'd 251 App. Div. 811, 298 N. Y. Supp. 188 the New York Supreme Court stated as follows on page 552:

> "It is well settled law that under a contract such as we have here, in which it is specifically stipulated that the city does not guarantee the completeness or correctness of the borings, or of the results thereof, the city is nevertheless liable if it knowingly misrepresents the conditions, or if it withholds from the contractor any material information of which the city had knowledge and which if disclosed would have tended to indicate the incorrectness of the boring sheets attached to the contract. In other words, implicit in a contract of the kind we are considering is the requirement that the city shall act in good faith. Foundation Co. v. State of New York, 233 N. Y. 177, 135 N. E. 236; Rodgers & Hagerty Inc. v. City of New York, 247 App. Div. 874, 288 N. Y. S. 761; Dunn v. City of New York, 205 N. Y. 342, 98 N. E. 495; Weston v. State of New York, 262 N. Y. 46, 186 N. E. 197, 88 A. L. R. 1219."

In *McGovern* v. *City,* 202 App. Div. 317, 195 Supp. 925, modified as to amount of recovery, 235 N. Y. 275 the contract drawings contained boring data showing solid rock excavation, but which the City expressly stated was not guaranteed. There was a map in the City's file which would have shown that mud would be encountered instead of rock. The action was based on misrepresentation induced by the borings. Despite the exculpatory clause, the Court granted plaintiff contractor recovery for damages for the failure of the City to disclose what it should have known.

The Government in its brief below cited three decisions of this Court claimed to be applicable to the case at bar. Examination of these decisions discloses that the terms of sale in those cases were different from the contract in this case or that they did not involve shortages in delivery.

Lipshitz & Cohen v. *United States,* 269 U. S. 90, cited by the Government, involved a sale in which the purchaser, by the terms of sale agreed to accept the stated weights as correct, and in which all the materials at designated locations and specific lots thereof were sold. The claim in that case was for loss of profits, not for overpayment. In that case, this Court referred to the "good faith" required of the party making the estimate of quantities. There was no evidence of misrepresentation in that case. In our case, there is clear error on the part of the Government which misled the plaintiff.

Maguire & Co. v. *United States,* 273 U. S. 67, also cited by the Government, did not involve shortage in quantity but the weight of certain cloth before and after waterproofing.

American Elastics Inc. v. *United States,* 187 F. 2d 109, cert. denied, 342 U. S. 829, cited by the Government, likewise related to the quality of the goods and not to shortage in delivery.

Mottram v. *United States,* 271 U. S. 15 seems to be the only decision by this Court involving facts similar to the case at bar. In that case, the Government sold materials in the quantity listed in a catalogue, "subject to errors in description and without any warranty whatever." The catalogue erroneously listed the quantity by hundred-

weights instead of pounds. The purchaser submitted a bid per pound. The purchaser had full opportunity to determine the quantities for himself and to ascertain that the quantity listed in the catalogue was an obvious error.

After the payment by the purchaser in which he demanded the quantity as listed and upon the discovery of the error by the Government, the purchase price was returned, without prejudice. The purchaser then sued for breach of contract. This Court held that the purchaser could not recover. Although it is not so expressly stated in the opinion of this Court, the return of the purchase price by the Government to the purchaser was an important fact in the case.

So in our case, plaintiff does not sue for loss of profits but for the return of the overpayment for materials which he did not receive as represented by the Government. The same relief which was granted to the purchaser in the *Mottram* case by agreement should be granted by the Court in this action.

It is to be noted that in the Court below, the Government did not cite the *Mottram* case, *supra,* in which the Government by agreement returned the purchase price after the discovery of error in the listing of quantity.

CONCLUSION

We submit that in the public interest, this Court should review the judgment of the Court of Claims and establish the law as to the rights of purchasers and the obligations of the Government on contracts for the sale of surplus property in circumstances as here presented and that a writ of certiorari be granted.

Respectfully submitted,

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